MEMORANDUM OF LAW

DATE: June 21, 1993

TO: Laurie M. Schwaller, Purchasing Agent

FROM: City Attorney

SUBJECT: Water and Sewer Group 481 Project -- Refusal of Low Bidder Mur-Vic Construction Company to Sign Contract

This memorandum replies to your inquiry concerning the intended award to the low bidder for the subject project, Mur-Vic Construction Co. By letter dated May 26, 1993, Mur-Vic informed the Purchasing Department that it "withdraws ┌itsσ bid dated March 5, 1993 on the grounds that the City has failed to award the project within a reasonable length of time." Mur-Vic contends that 81 days elapsed from the March 5, 1993 bid opening date to the May 25, 1993 date the contract documents were delivered for signing. (The City's facts show that the contract was awarded on May 13, 1993 and sent to the contractor on May 20, 1993.) Your question is whether Mur-Vic is legally entitled to withdraw its bid for the asserted reason, and if not, what if any liability exists on its bid bond.

San Diego City Charter section 94 provides in part that "┌eσach bidder shall furnish with his bid such security or deposit insuring the execution of the contract by him as shall be specified by the Council or as provided by general law." Hence, we look to the Council's ordinances (San Diego Municipal Code) and general law (California Public Contract Code and Civil Code) for guidance. Municipal Code section 22.0515 simply states that "┌tσhe Purchasing Agent is authorized to require vendors and contractors to provide such insurance and surety bonds as may be required for City procurement." Public Contract Code ("PCC") section 20170, which applies to local agency public construction contracts, provides that "┌aσll bids shall be presented under sealed cover and accompanied by one of the following forms of bidder's security: (a) Cash. (b) Cashiers check . . . (c) A certified check . . . (d) A bidder's bond." PCC section 20172 further provides that "┌iσf the successful bidder fails to execute the contract, the amount of the bidder's security shall

be forfeited to the city except as hereinafter provided." The exception comes in PCC section 20174, which provides that the bid security must be applied by the City to cover the difference between the low bid and the next lowest bid, and if there is residue, it is to be refunded to the defaulting bidder.

The PCC provisions dealing with local agency public construction do not directly address the question regarding the circumstances upon which a bidder is entitled to relief. Instead, other applicable sections of the PCC cover this topic, and these appear to be based on holdings found in case law. Generally, if the successful bidder fails to execute the contract, the amount of security is forfeited, unless he has a legal excuse for failure. M.F. Kemper Constr. Co. v. Los Angeles, 37 Cal. 2d 696 (1951). "Once opened and declared, the company's bid ┌isσ in the nature of an irrevocable option, a contract right of which the city ┌canσ not be deprived without its consent unless the requirements for rescission ┌areσ satisfied." Id. at 700.

The grounds for rescission of contract are set forth in Civil Code section 1689, and are several. One of the most common grounds was the one at issue in the M.F. Kemper case: mistake of fact or "clerical error" in submitting the bid. This basis for rescission forms the sole foundation for the statutory scheme which has refined the holding of M.F. Kemper, the Relief for Bidders Act, PCC sections 5100 through 5108. Particularly, PCC section 5103 is entitled "Grounds for Relief," and the only basis it provides for relief is mistake. Moreover, the party seeking relief has the burden of proving a material mistake and of promptly notifying the other party of its occurrence. Since there is no grounds for relief in the Relief of Bidder's Act for the contractee's (i.e., City's) failure to accept the bid within a reasonable time, we believe that there is no express basis in that Act which supports Mur-Vic's position.

However, although the statutes and the M.F. Kemper case provide that a bonded bid for a public work project is in the nature of an irrevocable option, this holding must somehow be reconciled with the general principle of contract formation which provides that offers which do not prescribe a specific term automatically expire if not accepted within a reasonable time. Civil Code section 1587(2); Restatement Contracts 2d Section 41(1); 1 Wiliston 3d Section 54; Bogart v. George K. Porter Co., 193 Cal. 197 (1924); Coats & Williamson, Inc. v. Moran & Co., 67 Cal. App. 46 (1924). Under this established rule, reasonable time is a question of fact, dependent on the circumstances existing when the offer and attempted acceptance are made; such

circumstances include the nature of the proposed contract, the purposes of the parties, the course of dealing and relevant usages of trade. Bandy v. Westover, 200 Cal. 222, 230 (1927); Forbes v. Board of Missions, 17 Cal. 2d 332, 339 (1941). Some unresolved dissonance exists here, however, for another court has held that what is a reasonable time is a question of law for the court. Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 750 (1909).

Regardless whether a question of fact or law, in the present case, the City's customary practice in regard to acceptance of contract bids should be considered, as well as its specific past dealings with Mur-Vic. The nature of the contract should be taken into account, for large public work bids usually entail review by several authorities within a public agency before official acceptance can be given. On the other hand, the nature of the contracting business is also subject to the vicissitudes of price fluctuations and the availability of subcontractors and supplies, so there must be some assurance of timely acceptance of bids. The totality of the circumstances must be evaluated, for the whole issue of reasonableness rests with such an evaluation. In some instances, a short period for acceptance is reasonable; in others a longer time is allowed. See Coats & Williamson, 67 Cal. App. 46 -- (market for hay fluctuating -- acceptance after two weeks found to be too late); compare Thorpe v. Story, 10 Cal. 2d 104 (1937) -- (guarantors of bonds were liable for payment on those bonds despite lapse of over six years between execution of "guarantee" and filing of action thereon by bondholders committee, contention rejected that "guarantee" was made for benefit of third parties and was not an absolute guarantee, but a mere offer of guarantee which was revoked by lapse of unreasonable time without communication of acceptance.)

Thorpe involved an "absolute guarantee," which means an unconditional guarantee. "A suretyship obligation is to be deemed unconditional unless its terms import some condition precedent to the liability of the surety." Civil Code section 2806. "An absolute guaranty is binding upon the guarantor without notice of acceptance, and delay in enforcement does not exonerate him." Thorpe, 10 Cal. 2d at 118; Civil Code Section 2795.

Mur-Vic's bid bond (Attachment A), written by the Insurance Company of the West ("ICW"), provides that:

> ┌If the bid . . . of said principal
> ┌Mur-Vic┐ shall be accepted, and the
> contract for such work be awarded to

> the principal thereupon by the said obligee ┌City┐, and said principal shall enter into a contract and bond for the completion of said work as required by law, then this obligation to be null and void, otherwise to be and remain in full force and effect. ┌Emphasis added.┐

This bond language should be compared to the standard bid bond form of the American Institute of Architects (Form A310; Attachment B) which provides that "if the Obligee shall accept the bid of the Principal and the Principal shall enter into a Contract with the Obligee in accordance with the terms of such bid . . . this obligation to be null and void, otherwise to remain in full force and effect." Also, compare the standard CALTRANS bid bond (Attachment C) which provides that "if the Principal is awarded the contract and, within the time and manner required under the specifications . . . enters into a written contract," then the surety is exonerated, otherwise, bound. Please note that these examples make reference to the terms of the specifications, or to the terms of the bid, in regard to time required for acceptance. The ICW bond is not specific in this respect, but neither were the City's specifications, nor Mur-Vic's bid. The issue could be argued that the ICW guarantee was unconditional, but given the plain reference to "acceptance," it could be asserted with equal reason that this means acceptance within reasonable time as the general civil law provides.

The City Charter and Municipal Code do not specifically address the subject as to how long a bid remains valid, nor does general law, nor the bid bond itself. As noted in Mur-Vic's own contention, the matter comes down to what is a "reasonable time." Although the 75 to 81 days taken to formally accept the bid in the present case is argued to be unreasonably too long, we note that Section 386(d) of the Los Angeles City Charter (as discussed in M.F. Kemper) provides that bids are subject to acceptance for a period of three months. So again, while there is no absolute indication in law applicable to The City of San Diego as to how long bids are subject to being accepted, there is evidence that other jurisdictions specifically provide for up to three months as being a reasonable time.

We should also point out the case of Palo and Dodini v. City of Oakland, 79 Cal. App. 2d 739 (1947). This is the only reported case that could be found which dealt with a bidder on public work who sought rescission for a reason other than mistake. The plaintiffs had bid for the concession contract to

provide pleasure boat services on Oakland's Lake Merrit in 1945-1946. They were to construct the electric boats and operate the amusement concession with a return to the City, after being the high bidder. But due to war conditions and inability to obtain priorities for acquisition of materials necessary to build the boats, they refused to sign the contract. The Oakland Board of Playground Directors foreclosed on their $1,000 certified check deposit. The disappointed contractors sued.

The court affirmed a judgment in the City's favor, holding: (a) plaintiffs could not bid for the boat concession contract and then refuse to enter the contract on the ground that, as they should have known, they would be denied priorities due to war conditions, especially where those conditions existed for some time; and (b) cities may require guarantee deposits to accompany bids and to forfeit them in the event the bidder fails or refuses to enter the contract; and (c) where a case is brought to relieve against a forfeiture rather than to enforce one, the burden is on the plaintiff to plead and prove matters entitling him to equitable relief from forfeiture.

In regard to the matter of foreclosure, the Palo and Dodini case differs from the Mur-Vic case in that Mur-Vic posted a bond rather than a cashier's check. Foreclosure on the bond would require a claim upon the surety, and if the surety resists, the City could be in the position of being a potential plaintiff to enforce foreclosure instead of being a potential defendant in an action which seeks to prevent foreclosure.

To sum this problem up, this case presents a close question. The City perhaps could make the point that its acceptance was not unreasonably late, and that the bid bond may be foreclosed upon if Mur-Vic maintains its present position. However, Mur-Vic may be able to argue with some persuasive conviction that the City was unreasonable in taking as long as it did to award and that its offer expired under Civil Code Section 1587(2). This will be a determination of fact, and we cannot be too certain that the City would prevail if it sought foreclosure on the bond if Mur-Vic refuses the contract.

We must be mindful of what foreclosure may require (i.e., a time and cost-consuming plaintiff's action). Given these days of limited resources, the possible benefits of potential litigation should be weighed against costs, especially where resources might be dedicated to other significant cases which do not present such a close question.

As a final point, this problem could be avoided in the future if the contract documents, or better yet, the Municipal Code, made express provision for the definite length of time bids

will be subject to acceptance. In this manner we would avoid all discussion of what time is reasonable, and avert the question whether unreasonable time is ground for relief. Both bidders and the City would know mutual rights and obligations. Please let us know if you are amenable to implementing this suggestion.

JOHN W. WITT, City Attorney
By
Frederick M. Ortlieb
Deputy City Attorney

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Attachments
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